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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

APPALACHIAN POWER COMPANY, INDIANA & MICHIGAN ELECTRIC COMPANY, KENTUCKY POWER COMPANY, KINGSPORT POWER COMPANY, MICHIGAN POWER COMPANY, OHIO POWER COMPANY, *and* WHEELING ELECTRIC COMPANY, *Petitioners,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Appalachian Power Company, a wholly owned subsidiary of American Electric Power Company, and its six sister subsidiaries, Indiana & Michigan Electric Company, Kentucky Power Company, Kingsport Power Company, Michigan Power Company, Ohio Power Company and Wheeling Electric Company, co-plaintiffs in the court below, petition this Court for a writ of certiorari to review a decision entered by the United States Court of Claims on October 17, 1979.

OPINION BELOW

The opinion of the Court of Claims is not yet reported; it appears in Appendix A to this petition.

JURISDICTION

The decision of the Court of Claims was entered on October 17, 1979 (Appendix A). Petitioners' timely suggestion and motion for rehearing *en banc* was denied by that Court on November 21, 1979 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

I. Whether the decision of the Court of Claims conflicts with this Court's decisions in *Payne* v. *New Mexico*, 255 U.S. 367 (1921), and *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961).

II. Whether an administrative agency lacks the power to create effective rights before the completion of judicial-review proceedings.

III. Whether an administratively final and presumptively valid Federal Power Commission license created rights that were vested and irrevocable, subject only to divestiture in the event of the occurrence of a condition subsequent authorized by the Federal Power Act (reversal upon judicial review) or the Constitution (a compensated taking).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) The Compensation Clause of the Fifth Amendment to the United States Constitution, which provides in part:

> "nor shall private property be taken for public use, without just compensation."

(2) The Federal Power Act, 16 U.S.C. § 791a *et seq.*, and in particular sections 4, 5, 6, 10, 13, 21, 28, 309 and 313 of that Act, 16 U.S.C. §§ 797, 798, 799, 803, 806, 822, 825h, and 825*l*. The text of these sections is set forth in Appendix C to this petition.

(3) The Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1271 *et seq.*, as amended by Pub. L. No. 94-407, 90 Stat. 1238 (September 11, 1976). Sections 1273 (a), 1277 and 1278(a) of the Wild and Scenic Rivers Act as amended are set forth in Appendix D to this petition.

STATEMENT OF THE CASE

This case involves important questions regarding the power of Congress to nullify without just compensation an effective Federal Power Commission (FPC) license, whose validity had been affirmed by the Court of Appeals for the District of Columbia Circuit, when the congressional action took place prior to the disposition of a petition for certiorari filed with this Court.

Petitioner Appalachian Power Company (Appalachian) is a public utility company which provides electric power to customers in the States of Virginia and West Virginia.[1] On June 20, 1962, Appalachian applied to the FPC [2] for a preliminary permit under section 5 of the Federal Power Act, 16 U.S.C. § 798, to maintain priority of application for a license to construct the Blue Ridge pumped-storage and hydroelectric project on the New River in Grayson County, Virginia, and in Allegheny and Ash Counties, North Carolina (hereinafter the Blue Ridge Project). The Commission granted Appalachian's preliminary permit on March 11, 1963. *Appalachian Power Co., Project No. 2317,* 29 F.P.C. 445 (1963).

On February 27, 1965, Appalachian filed its formal application for a license to construct the Blue Ridge Project. After lengthy hearings, the Administrative Law Judge recommended on October 1, 1969, that the license should be issued. *Appalachian Power Co., Project No. 2317,* 51 F.P.C. 1906, 1964 (1974).

After further extensive proceedings and two further favorable decisions by the Administrative Law Judge, the Commission unanimously issued an order granting the Blue Ridge license to Appalachian on June 14, 1974. 51 F.P.C. 1906 (1974). However, because the 93d Congress then had legislation under consideration that

[1] As the Court of Claims recognized, *post* at 1a n.1, the co-petitioners were joined as plaintiffs because some portion of the damages may have been suffered by them.

[2] On August 4, 1977, the Federal Energy Regulatory Commission assumed the FPC's former responsibilities with respect to water projects. 42 U.S.C. § 7172(a). Since the agency was known as the FPC throughout these proceedings, it will be referred to as such in this petition.

might have foreclosed or delayed the project, the Commission elected to postpone the effective date of its order until January 2, 1975, in order to allow the Congress adequate time to act on the proposed legislation. *Id.* at 1951-52. As required by section 6 of the Federal Power Act, 16 U.S.C. § 799, Appalachian formally accepted the license by action of its Board of Directors on June 20, 1974. Shortly afterwards, the State of North Carolina sought judicial review of the Commission's order in the District of Columbia, alleging various procedural defects in the Commission's decision-making process.

The then-pending legislation failed of enactment, and the license became effective on January 2, 1975, in accordance with its terms.[3] Twenty-nine days later, on January 31, 1975, the Court of Appeals granted a stay of the license order at North Carolina's request. On March 24, 1976, in *North Carolina* v. *FPC,* 533 F.2d 702 (D.C. Cir. 1976), the Court of Appeals, in a unanimous opinion, *id.* at 707, rejected all of North Carolina's arguments and upheld (with one slight modification) the Commission's order granting the license. The stay previously issued was vacated. Two days later, the Commission declared again that the license "is in effect." *Appalachian Power Co., Project No. 2317,* FPC Order Modifying License (March 26, 1976). North Carolina then sought a writ of certiorari from this Court (No. 75-1657, filed May 14, 1976).

Before this Court acted on North Carolina's petition, Congress passed and the President signed Pub.

[3] In an opinion denying a stay of the effective date that North Carolina had requested, the Commission stated that "[t]he 93d Congress had adjourned without enacting legislation 'that would foreclose or delay the Blue Ridge Project.' " 52 F.P.C. 1986, 1987 (1974).

L. No. 94-407, 90 Stat. 1238 (September 11, 1976), which amended the Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1271 *et seq.* Section 1 of the Act added to the National Wild and Scenic Rivers System "that segment of the New River in North Carolina extending from its confluence with Dog Creek downstream approximately 26.5 miles to the Virginia State line." This was precisely the segment affected by the Blue Ridge Project. 51 F.P.C. at 1917. Section 2 was a unique [4] provision applicable only to the New River:

> "Any license *heretofore* or hereafter issued by the Federal Power Commission affecting the New River of North Carolina shall continue to be effective only for that portion of the river which is not included in the National Wild and Scenic Rivers System pursuant to section 2 of this Act and *no project or undertaking so licensed shall be permitted to invade, inundate or otherwise adversely affect such river segment.*" Pub. L. No. 94-407, 90 Stat. 1238, § 2; 16 U.S.C. § 1278(a) (emphasis added).

[4] Pub. L. No. 94-407 is unique in that it purports to nullify an FPC license "*heretofore*" issued. *Compare, e.g.*, Pub. L. No. 94-199, 89 Stat. 1117, to which the Court of Claims referred in its opinion. Appalachian Power Co. v. United States, No. 62-78, *post* at 2a n.2. The legislative history of Pub. L. No. 94-407 demonstrates beyond question that Congress intended to kill the Blue Ridge Project by passage of the law. *See* S. Rep. No. 94-952, 94th Cong., 2d Sess. 6, 9-10, 12-13 (1976); H.R. Rep. No. 94-1264, 94th Cong., 2d Sess. 3-5, 7-8 (1976). Beginning with the first paragraph of the opening speech by the House Manager of the bill, Appalachian's license was virtually the only topic of discussion on the floor of both Houses. *See* 122 Cong. Rec. 26740-26758, 28372-28392, 28397-28411 (1976). Congress expressly recognized that Appalachian had a right to pursue a Tucker Act (28 U.S.C. § 1491) claim in the Court of Claims for compensation for the nullified license. S. Rep. No. 94-952, 94th Cong., 2d Sess. 12-13 (1976).

It is uncontested that Congress knew that Appalachian's Blue Ridge license was the only FPC license meeting the "heretofore" description of section 2 of the Act and, indeed, that the sole purpose and effect of Pub. L. No. 94-407 was to bar the construction of the Blue Ridge Project, despite the fact that Appalachian held a license for the maximum fifty-year period allowed under section 6 of the Federal Power Act, 16 U.S.C. § 799.

On October 18, 1976, following a procedure urged by the Solicitor General's office, this Court granted North Carolina's petition for certiorari, vacated the judgment below, and remanded the case to the Court of Appeals for further consideration in light of Pub. L. No. 94-407. *North Carolina* v. *FPC,* 429 U.S. 891 (1976). The Court of Appeals concluded that the new law had mooted North Carolina's challenge to the FPC order and dismissed North Carolina's petition. *North Carolina* v. *FPC,* No. 74-1941 (D.C. Cir., filed Jan. 4, 1977). The Commission took (and has taken) no further action with regard to the license.[5]

On February 14, 1978, petitioner filed the present action in the Court of Claims pursuant to that court's Tucker Act jurisdiction, 28 U.S.C. § 1491, seeking compensation for the valuable rights that had been nullified by Pub. L. No. 94-407. On a motion for partial

[5] No court and no agency has ever found Appalachian's license to be invalid. The Court of Appeals' ruling on remand extended only to the question whether North Carolina, the party before it, had a live controversy with the FPC. The decision of the Court of Appeals not to reinstate its previous opinion affirming the validity of the license, in light of the mootness it had found, simply restored the license to the status of a presumptively valid administrative order. *See, e.g.*, Certified Color Mfrs. Ass'n v. Mathews, 543 F.2d 284, 293 (D.C. Cir. 1976).

judgment on the pleadings, petitioner argued that Pub. L. No. 94-407 effected a taking of property or contract rights, that it breached a contract between the United States and Appalachian, and that the Federal Power Act itself entitled petitioner to just compensation. The Government cross-moved for dismissal of the petition. In an opinion dated October 17, 1979, the Court of Claims granted the Government's motion (*post,* 1a to 16a). The court apparently agreed with petitioner's contention that FPC licenses are irrevocable under the terms of the Federal Power Act.[6]

[6] *Post,* 15a n.11. The word "apparently" is necessary because of the court's lengthy discussion of the effect of section 28 of the Federal Power Act, 16 U.S.C. § 822, on the irrevocable nature of licenses. Section 28 provides:

> "The right to alter, amend, or repeal this chapter is expressly reserved; *but no such alteration, amendment or repeal shall affect any license theretofore issued under the provisions of this chapter or the rights of any licensee thereunder.*" (Emphasis added.)

The Government argued before the Court of Claims that Pub. L. No. 94-407 was subsequent legislation of general application, therefore applicable to petitioner as well as all other FPC licensees in accordance with the holding of Scenic Hudson Preservation Conference v. Callaway, 370 F. Supp. 162 (S.D.N.Y. 1973), *aff'd per curiam,* 499 F.2d 127 (2d Cir. 1974). Petitioner argued to the contrary, since Pub. L. No. 94-407 unquestionably altered the Commission's powers under the Act in at least two ways: it revoked a license for reasons not previously authorized by the Act, and it deleted one particular river segment from the areas that the Commission was authorized to license. Furthermore, petitioner pointed out that Pub. L. No. 94-407 was not a law of "general" application, since its sole purpose and effect were to bar the construction of Appalachian's project. The Court of Claims stated in apparent dictum that it agreed with the Government's position, *see* 13a, *post.* Immediately thereafter, however (p. 14a), the court stated that it did not need to decide the question whether the petitioner's license was irrevocable (presumably pursuant to section 28) at the time Pub. L. No. 94-407 was enacted because the pendency of North Carolina's petition for certiorari rendered the license still revocable.

However, the court found it unnecessary to decide whether such irrevocability meant that compensation was required for congressional action such as Pub. L. No. 94-407, because it concluded that

> "the irrevocable attribute of an FPC license does not vest until judicial review is complete or the time for such review has lapsed." *Post,* 14a.

On November 21, 1979, the Court of Claims denied petitioner's motion for rehearing and its suggestion for rehearing *en banc.*[7]

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Claims Conflicts with Two Decisions of This Court.

A. *Payne* v. *New Mexico*

The effect of a power of review upon the vesting of statutorily authorized rights was the central issue in *Payne* v. *New Mexico,* 255 U.S. 367 (1921). *Payne* involved federal statutes that granted to the State of New Mexico the right to certain public lands for the support of its schools.[8] The State was entitled to select other federal lands in instances where the initial general grant excluded some areas. In addition, the laws provided that, in the event that one of the sections originally designated by the State later became part of a

[7] Prior to oral argument, the Government had suggested that the case was of such importance that the *initial* hearing should be *en banc.* Letter of Thomas W. Petersen, Esq., to Frank T. Peartree, Clerk, Court of Claims, May 4, 1979.

[8] Acts of June 21, 1898, ch. 489, §§ 1, 8; 30 Stat. 484; March 16, 1908, ch. 88, 35 Stat. 44; June 20, 1910, ch. 310, §§ 6, 10-12, 36 Stat. 557; February 28, 1891, ch. 384, 26 Stat. 796, amending §§ 2275-76, Rev. Stats.

federal public reservation, the State would waive its right to those lands and select other lands of equal acreage (its "lieu lands"). In order to obtain vested rights to the lieu lands, the statutes required the State to file its selection list in the local land office and otherwise to give notice of the selection. That office would forward the list to the General Land Office in the Department of the Interior. The Commissioner of the General Land Office then had to review and survey the State's selections. Finally, the Secretary of the Interior had the responsibility of reviewing the selection for compliance with all pertinent provisions of the law and giving his final approval.

Some of the tracts given to New Mexico were later designated for inclusion in a federal public reservation, the Alamo National Forest. The State accordingly waived its rights to the so-called "base tract" and filed a selection list for "lieu lands" in the local land office. While its selection list was pending in the General Land Office for the Commissioner's approval, the base tract was removed from the National Forest. The Commissioner therefore canceled the State's lieu land selections. On appeal to the Secretary of the Interior, the Commissioner's decision was affirmed.

The State then filed suit in federal court and obtained an injunction prohibiting the Secretary and the Commissioner from canceling the State's lieu land selections. This Court, affirming, held that the State acquired vested rights in the lieu lands at the time it waived its rights in the base tract and filed its selection list. Congress in effect had told the State:

> "If you will waive or surrender your titled tract in the reservation, you may select and take in lieu of it a tract of like area from the unappropriated non-mineral public lands outside the reservation. *Acceptance of such a proposal and compliance with its terms confer a vested right in the selected land which the land officers cannot lawfully cancel or disregard.*" *Id.* at 370 (emphasis added).

The Government agreed that the lieu lands could not be taken from one who had perfected his title, but it argued that the State's right did not become vested until the Secretary had given his final approval to the selection. This Court rejected that argument for reasons directly applicable to this case:

> "To this we cannot assent. The words relied upon are not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the Secretary the duty of ascertaining whether the selector is acting within the law, in respect of both the land relinquished and the land selected, and of approving or rejecting the selection accordingly. *The power conferred is 'judicial in its nature' and not only involves the authority but implies the duty 'to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections.'*" *Id.* at 371 (emphasis added).

The duty of the reviewing court under section 313 of the Federal Power Act, 16 U.S.C. § 825*l*, is precisely the same as the Secretary's duty in *Payne*: namely, the court's duty is to ascertain whether the Commission's order complied with all relevant statutory provisions, including the requirement that the order be supported by substantial evidence. Like the Secretary in *Payne* with respect to the vesting of the lieu lands selection, the reviewing court has no role to play with respect to the effectiveness of the order granting the FPC license. Instead, the Federal Power Act specifically con-

fers on the Commission the authority to prescribe when and in what manner its orders are to become effective. Section 309, 16 U.S.C. § 825h. The argument that the Government made and lost in *Payne* is the same as the argument the Court of Claims accepted here: that rights under a statute cannot vest until they are "perfected" by the exhaustion of all rights of review provided for by the statute. Indeed, this case follows *a fortiori* from *Payne,* since in *Payne* the Secretary's review power, though "judicial in its nature," was still part of the administrative process. Here, the administrative process was completed and petitioner's license had become effective in accordance with the Commission's order.

The Court of Claims' decision, which does not mention *Payne* and which cites no authority for its conclusion that the completion of judicial-review proceedings is indispensable to the irrevocability of an FPC license, is flatly inconsistent with the decision in *Payne*. The fact that petitioner might have lost its license if this Court had granted North Carolina's petition for certiorari and had decided against the validity of the license is insufficient to support the Court of Claims' decision. That (remote) contingency is no different from the contingency faced by the State of New Mexico that the Secretary of the Interior might have found legal error in the State's selection, thereby causing the State to lose title to the lieu lands. Since the Secretary never made any such decision in *Payne,* the State's vested right in its land was undisturbed. Similarly, although this Court could have taken away petitioner's license if it had found legal error in the Commission's proceedings, that never happened. Neither the statute involved in *Payne* nor the Federal

Power Act makes vesting (or irrevocability) of the right in question contingent upon a favorable outcome in statutory review proceedings.

B. *CAB* v. *Delta Air Lines*

In *CAB* v. *Delta Air Lines, Inc.,* 367 U.S. 316 (1961), the Board had granted Delta a certificate of public convenience and necessity to operate certain aviation service. Five months after the certificate became effective, the Board acted on petitions for reconsideration by amending Delta's certificate to make it more restrictive. The Board had previously, before the effective date, reserved the right to make such amendments. This Court held that, once the certificate became effective, it could not be amended or impaired without compliance with the provisions of section 401(g) of the Federal Aviation Act, 49 U.S.C. § 1371(g), which required notice and hearing prior to any alteration or suspension of a certificate. Neither the pendency of the petitions for reconsideration nor the Board's attempted reservation of jurisdiction was allowed to affect that result.

The Court relied primarily on its conclusion that, in enacting the Federal Aviation Act, Congress "was vitally concerned with what has been called 'security of route.' " 367 U.S. at 324. "Congress wanted certificated carriers to enjoy 'security of route' so that they might invest the considerable sums required to support their operations . . . ." *Id.* at 331. And, the Court concluded, "to the extent there are uncertainties over the Board's power to alter effective certificates, there is an identifiable congressional intent that these uncertainties be resolved in favor of the certificated carrier . . . ." *Id.* at 325.

The Federal Power Act is perhaps the clearest instance in our history of a demonstrable congressional intent to create vested rights that would encourage and protect large investments dependent on those rights ("security of license"). (See pp. 14-19 below.) In such circumstances, this Court's decision in *Delta* means that such rights cannot be impaired by the agency itself, save as Congress prescribed, even while petitions for reconsideration are pending—much less by a wholly extraneous congressional uncompensated taking during the lengthy process of judicial review.

C. The Facts and Governing Statute Place This Case Squarely Within the *Payne* and *Delta* Principles, and the Lower Court's Decision Gravely Misinterprets the Federal Power Act and Frustrates Its Purpose.

Section 309 of the Federal Power Act, 16 U.S.C. § 825h, provides, as noted above, that "[o]rders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe." Petitioner's license accordingly became effective on January 2, 1975, and petitioner thereupon had the unrestricted legal right to commence full-scale construction of the Blue Ridge Project, together with the power of eminent domain conferred by section 21 of the Federal Power Act, 16 U.S.C. § 814. Petitioner's rights were vested, subject to divestment only for specific reasons authorized by the Federal Power Act, including a subsequent judicial holding of invalidity.[9] Neither that possibility nor any other authorized by the Act (*e.g.*, divestiture for failure to comply with the terms of the license) ever occurred.

Sections 4, 6, and 28 of the Federal Power Act all demonstrate that Congress intended to make FPC licenses effective, vested rights from the date of issuance by the Commission. Section 4(e), 16 U.S.C. § 797 (e), gives power to the Commission "[t]o *issue* licenses . . . for the purpose of constructing, operating, and maintaining dams [etc.]." (Emphasis added.) The fifty-year maximum term prescribed by section 6, 16 U.S.C. § 799, is measured from the time of *issuance* of the license, not from the time that judicial-review proceedings are complete or from the expiration of the time for seeking review. Section 6 also provides that "[l]icenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered . . . only upon mutual agreement . . . ." 16 U.S.C. § 799. Finally, an unusual and striking provision, Section 28, 16 U.S.C. § 822, provides that "no such alteration, amendment, or repeal [by Congress] shall affect any license theretofore *issued* under the provisions of this chapter or the rights of any licensee thereunder." (Emphasis added.)

The legislative history of the Federal Power Act requires the same conclusion as to the time of vesting. For example, Mr. O. C. Merrill of the U.S. Forest

[9] Section 313(c) of the Act, 16 U.S.C. §825*l*(c), provides that the commencement of judicial-review proceedings "shall not, unless specifically ordered by the court, operate as a stay of the Commission's order." The stay issued by the Court of Appeals in this case was vacated by that court more than five months before Pub. L. No. 94-407 was enacted; thereafter the license was admittedly "in effect." *Post*, 5a. Thus the Court of Claims' apparent use of 16 U.S.C. § 825*l* to impeach the vested nature of FPC licenses pending judicial review, *post*, 14a, is wide of the mark.

Service, U.S. Department of Agriculture, testified that he thought "it is extremely important that the licenses *when issued* shall be contracts . . . ." Exchange between Representative Raker of California and O. C. Merrill, Water Power, Hearings Before the House Committee on Water Power, 65th Cong., 2d Sess. at 91-92 (1919) (emphasis added). Representative Parker stated that "the license *when once granted* would be private property and could be taken only for just compensation . . . ." *Id.* at 391 (emphasis added). Nothing in the legislative history comes close to suggesting that these characteristics of licenses would attach only upon the completion of judicial-review proceedings.

Indeed, the entire legislative history of the Federal Power Act demonstrates the same congressional desire to create vested, secure rights that this Court held decisive in *Delta*. The reason for the legislation was that the earlier statutes [10] provided for revocable permits only; the result was that "the terms of the investment [were] so uncertain and the continuance of the permit or tenure of title so defeasible that those having capital cannot safely and will not make investments under them." S. Rep. No. 179, 65th Cong., 2d Sess. 3 (1917). In consequence, only a few dams had been constructed and "the enormous possibilities of water-power still available" were going unexploited. H.R. Rep. No. 61, 66th Cong., 1st Sess. 3 (1919).[11] Thus

[10] General Dam Act of 1906, ch. 3508, 34 Stat. 386; General Dam Act of 1910, ch. 360, 36 Stat. 593.

[11] It is ironic that the New River, the very river involved here, was mentioned during the debates as one of the rivers that "have been held back from development" because of the absence of a "national Federal Water Power Act." 59 Cong. Rec. 241 (1919).

the 1920 Act was designed to ensure that the rights embodied by an FPC license were *not* defeasible and that private investment would not continue to avoid water-power development. S. Rep. No. 179, *supra*, at 1.[12] That purpose of the Federal Power Act—to encourage greater development of the nation's water-power resources—has been expressly recognized on at least two occasions by this Court. *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 251 (1954); *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152, 171 (1946).

It was this purpose that motivated the vesting provisions of the legislation and that brings FPC licenses squarely within the principles announced by this Court in *Delta*. The legislative history (1) demonstrates that a principal purpose of the legislation was to encourage and to secure investment by authorizing irrevocable licenses; [13] (2) is replete with references to the licenses once issued as vested contract and property rights; [14]

[12] *Accord*, H. Rep. No. 61, 66th Cong., 1st Sess. 4-5 (1919); S. Rep. No. 179, 65th Cong., 2d Sess. 1-2 (1917); S. Rep. No. 898, 63d Cong., 3d Sess. 10 (statement of Secretary of Interior Lane) (1915); 58 Cong. Rec. 1939, 2020, 2222 (1919).

[13] *See also, e.g.*, 59 Cong. Rec. 241, 244 (1919); *id.* at 1172 (1920); 58 Cong. Rec. 2021, 2221, 2222, 2223, 8892, 9319 (1919); 53 Cong. Rec. 3226, 3361-62, 3373 (1916); 51 Cong. Rec. 11422, 12586, 12767, 13035 (1914); Water Power, Hearings Before the House Committee on Water Power, 65th Cong., 2d Sess. 32, 36, 76-77, 91-92, 199-200, 541, 662, 690 (1918) (hereinafter cited as "Hearings").

[14] *E.g.*, 59 Cong. Rec. 1042-44, 1046, 1047, 1172, 1441 (1920); 58 Cong. Rec. 2223 (1919); 56 Cong. Rec. 9912-13, 9958 (1918); 53 Cong. Rec. 2639, 2650, 2690, 3128, 3227, 3298, 3349, 3352-53, 3373, 3416, 3418-19, 3423, 3607 (1916); 51 Cong. Rec. 11402, 11422, 12576, 12588, 12694-95, 12700, 12701, 12702, 12765, 12769, 12771, 12773-74, 12775-76, 12777, 12893-95, 12897-98, 13026-27, 13035, 13257 (1914); Hearings, n.13 *supra*, at 32, 71-72, 76-77, 199-200, 202, 391, 449, 666-67, 670, 689-90 (1918).

(3) shows that Congress was fully aware that the licenses would have value, independently of the value of any physical properties constructed;[15] and (4) shows Congress' understanding and intent that subsequent legislation having an adverse effect on a license would be a taking of property requiring just compensation under the Fifth Amendment.[16] A license would be "a vested right which Congress has no authority to amend or repeal except for violation of terms."[17]

By holding out the inducement of a fully protected property right in an FPC license, Congress accomplished its purpose. It is ironic that today, when the nation is firmly committed to alleviate a severe energy crisis through maximum development of its renewable energy resources such as water power, the court below should in this case take a position that would to a considerable extent restore the revocable permits, and uncertainty of investment attendant thereon, that so discouraged power development in the years before 1920.[18] In so holding, the court below ignored the principles declared by this Court in the *Payne* and *Delta* cases. As this Court declared in *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966):

> "It is not for [the Court] to so construe the Acts as to frustrate this clear-cut purpose so forcefully

[15] *E.g.*, 53 Cong. Rec. 3414 (1916); Hearings, n.13 *supra*, at 202.

[16] *E.g.*, S. Rep. No. 179, 65th Cong., 2d Sess. 3-4 (1917); 53 Cong. Rec. 3414, 3419, 3422 (1916); 51 Cong. Rec. 12700, 12895 (1914); Hearings, n.13 *supra*, at 391, 690 (1918).

[17] 51 Cong. Rec. 12576 (1914).

[18] *See* Alaska v. Andrus, 580 F.2d 465, 486 (D.C. Cir.), *vacated in part sub nom.* Western Oil & Gas Ass'n v. Alaska, 439 U.S. 922 (1978), where this very concern contributed to a holding that the Secretary of the Interior should not be directed to make offshore oil leases revocable.

> expressed by both friend and foe of the legislation at the time of its adoption."

Before so clear and massive an expression of congressional intent as exists in the case of the Federal Power Act, the principle of strict construction of statutes creating franchises, *Louisville Bridge Co.* v. *United States*, 242 U.S. 409 (1917), falls far short of bearing the burden the Court of Claims placed upon it here, *post* at 14a-15a.[19]

D. *Payne* and *Delta* Embody Important and Well-Established Legal Principles Which the Decision Below Ignored.

This Court's decisions in *Payne* and *Delta* flowed from two well-established legal principles that the decision below failed to recognize. These principles are important enough to warrant correction of the decision below by this Court.

The first principle is that, unless and until reversed by higher authority, a decision by an administrative agency enjoys a presumption of validity. ***E.g.*, *E. I. du Pont de Nemours & Co.* v. *Collins*,** 432 U.S. 46, 54-55 (1977); *Certified Color Manufacturers Ass'n* v. *Mathews*, 543 F.2d 284, 293 (D.C. Cir. 1976); *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 34 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976); *Wilmot* v. *United States*, 205 Ct. Cl. 666, 682 (1974). That principle means that, as this Court held in *Delta*, the pendency of review proceedings cannot authorize governmental action inconsistent with the presumption and in derogation of the rights created by the presumptively valid decision.

[19] While stating the strict-construction principle, the Court in *Louisville Bridge* also examined the statutory scheme and legislative intent in great detail, and found it was perfectly clear that the "franchise" there involved was not irrevocable.

Here, the court below in effect presumed that the FPC's decision was *invalid,* merely because that decision, although unanimously affirmed by the Court of Appeals, was still subject to the possibility that this Court might have (1) granted certiorari and (2) reversed. Thus the decision below presents in highly aggravated form an inconsistency with the presumptive-validity principle.

The Court of Claims' presumption of invalidity is fundamentally inconsistent with this Court's description of the role of a reviewing court in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.,* 435 U.S. 519 (1978):

> "We have also made it clear that the role of a court in reviewing the sufficiency of an agency's consideration of environmental factors is a limited one, limited both by the time at which the decision was made and by the statute mandating review." *Id.* at 555.

Elsewhere in *Vermont Yankee,* this Court again "caution[ed] reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress," *id.* at 525, and emphasized that "[t]he fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to re-examination in the federal courts under the guise of judicial review of agency action," *id.* at 558 (emphasis in original). It would have been impossible to stress more strongly that the agency's action is the critical event and that the role of the courts is a limited one. The Court of Claims' decision that a reviewing court must approve an agency's action before the agency can create a

vested right assigns an even greater role to the courts than the lower court had assumed in *Vermont Yankee.*

The second principle that the court below failed to recognize is that, once a right becomes effective, it is not a nullity, or readily revocable without compensation, merely because it is capable of being divested on the occurrence of a particular possible condition subsequent. Thus here, as in *Payne,* the possibility of divestiture through review proceedings (quasi-judicial in *Payne,* judicial here) did not permit any agency of government to nullify the right except through the occurrence of that condition subsequent. And here, as in *Delta,* the fact that review proceedings were pending (petitions for reconsideration in *Delta,* a petition for certiorari here) did not authorize impairment of the right except as Congress had specifically provided. Put another way, in investing large sums, committing resources and personnel to, and basing its development plans upon the Blue Ridge Project, Appalachian assumed two risks: (1) that the license would not be granted, (2) that, if granted, it might subsequently be overturned on judicial review. A risk Appalachian emphatically did not assume was that its license, once granted, would be subjected to an uncompensated (and wholly unprecedented) taking entirely apart from the judicial-review process, and by a body—Congress—which in section 28 of the Federal Power Act had expressly promised not to take such action.[20]

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[20] The Court of Claims' dictum that Pub. L. No. 94-407 was not within the scope of section 28 because the Wild and Scenic Rivers Act is a law of "general application," p. 12a *post,* is utterly insupportable. To the extent that the Government may rely upon this as an alternate ground for the lower court's decison, petitioner challenges it.

The Court of Claims failed to realize that the question is not whether the *original* Wild and Scenic Rivers Act was a law of

When a statute such as the Federal Power Act forms the basis for the creation of a right that will vest at some point, the right vests when all the prerequisites contained in the law have been satisfied. *See Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963) (unpatented mining claims were vested and entitled to compensation upon taking if all statutory requirements for the claims were met); *Payne* v. *New Mexico, supra.* In general, rights are vested if there is an immediate right of present or future enjoyment. *E.g., Pearsall* v. *Great Northern Railway,* 161 U.S. 646, 673 (1896). In the case of a final FPC order granting a license, such an immediate right exists. The right remains vested unless and until some future event authorized by the statute operates to divest it.

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general application, but instead is whether Pub. L. No. 94-407—the statute that frustrated petitioner's project—is such a law. Not only did the original law not include the New River; if that River had later been added by the normal process, petitioner's project would have been unaffected, since the Act does not purport to revoke *past* federal actions or to uproot vested rights without compensation. In fact, the Act explicitly requires just compensation for the taking of existing property rights. 16 U.S.C. § 1277. Petitioner's license was nullified by the special provision in Pub. L. No. 94-407—applicable then and now to no place in the country other than the particular 26-mile segment of the New River on which petitioner's project was to be located—that FPC licenses other than the particular 26.5-mile segment of the New River on "*heretofore* or hereafter issued" (16 U.S.C. § 1278(a), emphasis added) would be void. As noted above, p. 7, Congress also knew that petitioner held the only such FPC license.

The panel's incorrect reading of Scenic Hudson Preservation Conference v. Callaway, 370 F. Supp. 162, 171 (S.D.N.Y. 1973), *aff'd per curiam,* 499 F.2d 127 (2d Cir. 1974), makes sections 6 and 28 of the Federal Power Act dead letters. Amendments could be passed to any general law that expressly made particular FPC licenses ineffective, and the licensee would be left with no license and no compensation. This would destroy the entire statutory scheme carefully constructed by Congress in the Federal Power Act.

Reversal upon judicial review was simply a possible future event that, according to the terms of the Act incorporated in the license, might have divested petitioner's rights. The possibility of divestment in the future does not mean that a right is not presently vested. For example, where a mortgage conveys a defeasible title to the mortgaged property, the mortgagee has a vested interest in the land and is entitled to compensation upon a taking. *E.g., Louisville Joint Stock Land Bank* v. *Radford,* 295 U.S. 555, 601-02 (1935) (Kentucky law); *Swanson* v. *United States,* 156 F.2d 442, 445 (9th Cir. 1946), *cert. denied,* 329 U.S. 800 (1947). *See generally* 2 J. Sackman, *Nichols on Eminent Domain* § 5.741 (Rohan Recompilation 3d rev. ed. 1978). Contingent remainders and many other future, divestible interests are also vested, compensable property interests. *See, e.g., National Metropolitan Bank of Washington* v. *Stoner,* 177 F.2d 37 (D.C. Cir. 1949); *Nichols on Eminent Domain, supra,* § 5.22. Lessees for years or from year to year have an interest entitled to compensation upon a taking. *Nichols on Eminent Domain, supra,* § 5.23. Indeed, this Court has held that, even though a leasehold is periodically subject to divestment, the expectancy of lease renewal forms part of the value of the leasehold for condemnation purposes. *Almota Farmers Elevator & Warehouse Co.* v. *United States,* 409 U.S. 470 (1973).

When interests such as contingent remainders or leases from year to year are taken, the possibility of divestment affects only the question of value. *See United States* v. *2,184.81 Acres of Land,* 45 F. Supp. 681 (W.D. Ark. 1942); *Romero* v. *Department of Public Works,* 17 Cal. 2d 189, 109 P.2d 662 (1941). *See generally* Restatement of Property § 53.

Payne and *Delta* stand for the proposition that the possibility of reversal through review proceedings is not a condition precedent to the effectiveness of a right but rather a condition subsequent that might divest the right. That principle is wholly in accord with the statutory framework and legislative history of the Federal Power Act, and the failure by the court below to apply the principle was serious error.

II. The Court of Claims' Holding That an Administrative Agency Lacks the Power To Create Effective Rights Before the Completion of Judicial-Review Proceedings Would Seriously Interfere with the Authority of Federal Administrative Agencies Generally.

Since the Court of Claims reached its conclusion that FPC licenses do not become irrevocable until judicial review is complete or the time for such review has lapsed without mention of or reliance on any provision of the Federal Power Act or any judicial precedent, it is fair to assume that the court decided that no special provision of the Federal Power Act required or influenced that result. Furthermore, since the judicial-review provisions of the Federal Power Act are typical of many administrative statutes,[21] and the court offered no limiting principles for its holding, it is evident that the court's holding would apply to any administrative order that created vested rights. The decision logically applies also to the vast number of administrative orders that confer sufficiently firm in-

[21] *See, e.g.*, Clean Air Act, 42 U.S.C. § 7607(d)(9) (review of EPA actions); Federal Trade Commission Act, 15 U.S.C. § 45(c); Securities Exchange Act of 1934, 15 U.S.C. § 80a-42.

terests in the recipients that a due-process hearing is necessary before the interest can be revoked.[22]

The practical result of the Court of Claims' decision—that an administrative agency lacks the power to create rights that are vested and fully enforceable before the completion of judicial-review proceedings or the expiration of the time for seeking judicial review—will be to destroy the presumption of validity that administrative orders currently enjoy under the law. The lower court's decision so grossly misapplies accepted principles of administrative law and contains such great potential for further disruption that this Court's intervention is necessary. Indeed, since the only thing that prevented Appalachian's license from being irrevocable in the Court of Claims' opinion was the pendency of a petition for a writ of certiorari in this Court, the need for this Court's guidance is especially great. Only this Court can confirm or deny the validity of the Court of Claims' assumption that the legal consequences of the pendency of a petition for discretionary review are so drastic.

It is axiomatic that an administrative agency is authorized to exercise the powers that Congress has conferred upon it in its enabling legislation, so long as Congress itself has not acted beyond its authority. *See generally* K. Davis, Administrative Law Treatise, § 3.1 (2d ed. 1979). Among other things, Congress has the power to decide what kind of judicial review of the agency's actions will be afforded, and even whether any such review will be available. Thus, in the military

[22] *E.g.*, licenses granted pursuant to the Federal Communications Act, 47 U.S.C. § 301 *et seq.*; CAB certificates authorizing operations, CAB v. Delta Air Lines, *supra*.

area, Congress has decreed that military review of court-martial convictions shall be "final and conclusive" and binding on all courts of the United States. 10 U.S.C. § 876. In some cases, Congress permits broad-ranging *de novo* judicial review.[23] In other cases, as in the Federal Power Act, Congress gives only a restricted role to the courts.

Congress also prescribes when and in what manner agency orders become legally final and enforceable, as it did in section 309 of the Federal Power Act, 16 U.S.C. § 825h. The only question in this case is whether FPC license orders that are final for purposes of enforcement are somehow prevented from being "vested" by the possibility of change or reversal upon judicial review. Nothing in the Federal Power Act expressly states that FPC licenses become vested only after the completion of judicial-review proceedings or the expiration of the time for seeking review. Thus, the only way that the Court of Claims' decision could be supported would be language in the Act that fairly supports the court's conclusion, legislative history to that effect, or proof that Congress had no power to authorize the creation of vested rights at the time the FPC order becomes effective. In fact, both the language of the Act and its legislative history point inexorably to the opposite conclusion: that Congress intended to make licenses fully vested rights at the time the Commission decreed.

[23] *E.g.*, O'Dwyer v. C.I.R., 266 F.2d 575, 580 (4th Cir.), *cert. denied*, 361 U.S. 862 (1959) (Tax Court reviews IRS determinations *de novo*).

Upon examination, it becomes clear that the real meaning of the Court of Claims' holding is to reverse the presumption of validity that administrative orders now enjoy. In essence, that court held that a final judicial imprimatur is required before an agency order can be considered "irrevocable"—*i.e.* before an agency order can be relied upon as conferring present rights that can be divested only in the ways either authorized by the statute under which the rights were granted or authorized by the Constitution. Petitioner's FPC license was and is entitled to the presumption of validity accorded by the law to agency orders. The Court of Claims erred in denying the license that presumption.

Finally, the Court of Claims' decision will have important consequences for other types of property interests created under federal law, since the decision means that such interests do not acquire whatever vested character they may have until the completion of judicial-review proceedings—although *Payne* held to the contrary. And any kind of interest that is sufficiently protected to require a due-process hearing upon revocation may not become entitled to that hearing until judicial review is completed—although *Delta* held to the contrary.

The clear error in the Court of Claims' decision, and the serious consequences that it holds not only for FPC licensees but for administrative law generally, demonstrate the need for this Court to consider this case.

CONCLUSION

For the reasons stated above, petitioners request this Court to grant their petition for a writ of certiorari.

Respectfully submitted,

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January 24, 1980

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 62-78

(Decided October 17, 1979)

APPALACHIAN POWER COMPANY, et al.,

v.

THE UNITED STATES

Brice M. Clagett, attorney of record, for plaintiff. *Diane P. Wood* and *A. Joseph Dowd*, of counsel.

Thomas W. Petersen, with whom was *Assistant Attorney General Barbara Allen Babcock*, for defendant. *David A. Watts, John G. DeKoster, Jan MacPherson*, and *Fred R. Disheroon*, of counsel.

Before DAVIS, KASHIWA, and BENNETT, Judges.

On Plaintiff's Motion For Partial Judgment On The Pleadings And Defendant's Cross Motion For Judgment On The Pleadings

KASHIWA, *Judge*, delivered the opinion of the court:

This case is the last phase of a protracted, but unsuccessful, effort by plaintiff, Appalachian Power Company (Appalachian),[1] to build and operate the Blue Ridge

[1] Appalachian is a wholly owned subsidiary of American Electric Power Company (AEP), an investor-owned public utility holding company. AEP owns all of the voting stock of seven operating subsidiaries which provide electric service throughout a wide area that includes portions of Indiana, Kentucky, Michigan, Ohio, Tennessee, Virginia, and West Virginia. The seven plaintiffs supply electric service in the areas above mentioned. These seven subsidiaries exchange electric power among themselves and are planned, designed, and operated as a single integrated system.

(Footnote Continued)

Pumped Storage and Hydroelectric Project (Blue Ridge Project) on the New River above Galax, Virginia. The project was initiated by preliminary plans in 1962 and a formal application in 1965. Like similar hydroelectric projects initiated on or about the same period of this project, plaintiff ran into difficulties.[2] Since the Congressional enactment of Pub. L. No. 94-407 (approved September 11, 1976), amending the Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1271 *et seq.*, it is clear the proposed Blue Ridge Project will not be built. The question remaining for our decision is whether the enactment of Pub. L. No. 94-407 constituted, as plaintiff alleges, a taking of plaintiff's hereinafter described Federal Power Commission (FPC) license granting the plaintiff the right to build and operate the Blue Ridge Project. This question was recognized by Congress but left to the decision of this court.[3]

(Footnote Continued)

The petition alleges that while Appalachian is the principal plaintiff herein, it is likely that a trial will reveal that some portion of the damages complained of was suffered by one or more of the co-plaintiffs. Co-plaintiffs are therefore joined as plaintiffs as their interests may appear, whether as equitable owners of property interests or contract rights taken or interfered with by the United States, as third-party beneficiaries of a contract breached by the United States, as within the class protected by statutory rights referred to herein, or otherwise. Throughout this opinion the term "plaintiff" is used to refer primarily to Appalachian but to include co-plaintiffs as their interests may ultimately appear.

[2] The High Mountain Sheep Project, mentioned in *Udall* v. *FPC*, 387 U.S. 428 (1967), was terminated by passage of Pub. L. No. 94-199, § 1, 89 Stat. 1117, establishing the Hells Canyon National Recreation Area, 16 U.S.C. § 460gg *et seq.* The Asotin Dam, authorized under provisions of the Flood Control Act of 1962, Pub. L. No. 87-874, 76 Stat. 1173, was also deauthorized by Pub. L. No. 94-199. The Buffalo National River, established by Pub. L. No. 92-237, 16 U.S.C. § 460m-8 *et seq.*, deauthorized the Corps of Engineers Lone Rock Project and precluded a second project under study (Gilbert).

[3] *See* 122 Cong. Rec. at H8600, S14,932 (daily ed. 1976).

This taking issue is before the court on plaintiff's motion for partial judgment on the pleadings under Rule 38(c) of this court. The parties to the case agree that the question of whether defendant is liable is ripe for decision. Every fact necessary for the court's decision on the issue has been established by the pleadings, which makes Rule 38(c) the appropriate procedural vehicle. After carefully considering the parties' briefs and oral arguments, we hold in favor of defendant. There was no compensable taking.

Appalachian is a public utility company engaged in the business of providing electric power to customers in the States of Virginia and West Virginia. Its principal place of business is in Roanoke, Virginia. Appalachian commenced its effort to build the Blue Ridge Project on June 20, 1962, when it applied to the FPC for a preliminary permit under 16 U.S.C. § 798 (1976) to maintain priority of application for a license to construct the project. The FPC issued the preliminary permit on March 11, 1963.

Following the completion of feasibility studies, Appalachian filed on February 27, 1965, an application for a license to construct the Blue Ridge Project. The purposes of the project were to provide additional on-peak electric generating capacity to meet future projected needs of customers of the American Electric Power System and to improve the reliability of the American Electric Power System. Hearings on the proposed project and license application commenced in May 1967 and continued for two years.

On October 1, 1969, the administrative law judge issued his initial decision on the proposed project concluding that: "[t]he modified Blue Ridge Project represents the maximum utilization of the applicable reach of the New River sub-basin above Galax, Virginia with optimum project benefits * * *. No alternative site or source would provide the needed power more economically." *Appalachian Power Co.*, Project No. 2317, 51 F.P.C. 1906, 1966-1967 (1974). Accordingly, the initial decision recommended that a license be granted to Appalachian for the project.

Following the initial decision recommending that the project be licensed, additional hearings and administrative proceedings were conducted; and the administrative law judge issued two more opinions reaffirming the recommendation to issue an FPC license to Appalachian. The FPC twice heard oral arguments on the case and the commissioners personally examined the proposed Blue Ridge Project site. All parties requesting to do so were permitted to intervene despite deficiencies inherent in some petitions and that they were filed several years after the original license application. Also, the FPC staff prepared and circulated a final Environmental Impact Statement on the proposed project on June 17, 1973. Parties were given the opportunity to cross-examine FPC staff witnesses with respect to the Environmental Impact Statement at further hearings in July 1973. Furthermore, parties were allowed to file additional direct evidence with the FPC as late as July 13, 1973. No such evidence was filed by any party.

On July 14, 1974, the FPC, in a unanimous decision, issued the license to Appalachian; but the license expressly provided that it would not become effective until January 2, 1975.[4] Appalachian formally accepted the license by action of its Board of Directors on June 20, 1974. North Carolina then sought judicial review of the FPC's action in the United States Court of Appeals for the District of Columbia, alleging procedural defects in the FPC's decision-making process.

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[4] The effective date provision of the license states:

> (D) The license granted herein shall become effective January 2, 1975, unless on that date there exists an Act of Congress that would delay or foreclose the Blue Ridge project.

The six-month delay in the effective date of the license was placed in the license to allow the 93d Congress to finish considering legislation which was pending before it. The pending legislation was similar to Pub. L. No. 94-407, 90 Stat. 1238, which Congress enacted in 1976. The 93d Congress failed to enact the pending legislation and accordingly the FPC license became effective on January 2, 1975.

The Blue Ridge license became effective on January 2, 1975, in accordance with its terms subject however, as shown hereafter, to review by the respective United States Courts of Appeals and the Supreme Court as expressly spelled out in 16 U.S.C. § 825l (1958), a specific Federal Power Act provision. Prior to the effective date of the license, North Carolina sought a stay of the FPC's licensing order from the Court of Appeals. On January 31, 1975, the court granted the stay, 29 days after the license became effective. On March 24, 1976, in *North Carolina* v. *FPC,* 533 F. 2d 702 (D.C. Cir. 1976), the Court of Appeals vacated the stay it had issued pending the appeal and upheld the FPC's order granting the license.[5] Two days later the FPC declared that the license "is in effect." North Carolina then sought a writ of certiorari from the United States Supreme Court. 45 U.S.L.W. 3017 (1976).

Before the Supreme Court considered North Carolina's petition for certiorari, Congress passed, and on September 11, 1976, the President signed, Pub. L. No. 94-407, 90 Stat. 1238, amending the Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1271 *et seq.* Section 1 of the Act added to the national wild and scenic rivers system "that segment of the New River in North Carolina extending from its confluence with Dog Creek downstream approximately 26.5 miles to the Virginia State Line." The Blue Ridge Project affected this segment. Section 2, set out in the margin,[6] rendered

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[5] The circuit court's affirmance was with one minor modification. The modification was to require Appalachian to allow and to finance an archaeological excavation and salvage to be completed on the proposed dam site. This modification was subsequently incorporated into the FPC license for the Blue Ridge Project and accepted by Appalachian.

[6] Section 2 reads:

"(2) In section 7(a), after the third sentence, insert the following: 'Any license heretofore or hereafter issued by the Federal Power Commission affecting the New River of North Carolina shall continue to be effective only for that portion of the river

(Footnote Continued)

any FPC license ineffective for that portion of the river and provided that "no project or undertaking so licensed shall be permitted to invade, inundate or otherwise adversely affect such river segment."

Following the enactment of Pub. L. No. 94-407 the Supreme Court, following a procedure urged by the Solicitor General's office, granted North Carolina's petition for certiorari, vacated the judgment below, and remanded the case to the Court of Appeals for further consideration in light of Pub. L. No. 94-407. 429 U.S. 891 (1976). The Court of Appeals upon reconsideration concluded that North Carolina's challenge was moot and dismissed the petition for review.

Plaintiff filed its petition in this court on February 14, 1978.

Plaintiff's contention is that as of January 2, 1975, the FPC license for the Blue Ridge Project became effective. Once the license was effective plaintiff argues it became irrevocable for a term of 50 years under its express terms and the terms of 16 U.S.C. § 799 (1976).[7] In other words,

(Footnote Continued)
which is not included in the National Wild and Scenic Rivers System pursuant to section 2 of this Act and no project or undertaking so licensed shall be permitted to invade, inundate or otherwise adversely affect such river segment.' "

[7] Section 799 reads:

"Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of this
(Footnote Continued)

once effective plaintiff maintains it had an exclusive statutory franchise to develop the Blue Ridge Project in accordance with the terms of the FPC license. Although plaintiff agrees Congress had the power to alter, amend, or repeal the Federal Power Act, 16 U.S.C. §§ 791, *et seq.*, after January 2, 1975, plaintiff submits that the amendment, alteration, or repeal of any provision would not have any retroactive effect (*i.e.*, preexisting licenses would still exist as issued).[8] Since the Blue Ridge license was outstanding and presumptively validly issued at the time Congress enacted Pub. L. No. 94-407, plaintiff contends that section 2, *supra*, note 6, of that enactment constituted a taking of the Blue Ridge Project license. Plaintiff concedes Congress had the power to enact Pub. L. No. 94-407 and take the outstanding license, but submits that the power company is entitled to receive just compensation for the taking under the terms of 16 U.S.C. § 807(a) (1968), which reads in pertinent part:

> * * * *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this chapter at any time by condemnation proceedings upon payment of just compensation is expressly reserved.

Defendant counters that Congress has the power under the Commerce Clause of the Constitution to control the stream beds of navigable streams without liability. This is a recognized power. *United States* v. *Chandler-Dunbar*

(Footnote Continued)
subchapter and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 20 of Title 41."

[8] Plaintiff particularly relies upon 16 U.S.C. § 822 (1976) for this proposition. Section 822 reads:

"The right to alter, amend, or repeal this chapter is expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this chapter, or the rights of any licensee thereunder."

Water Power Co., 229 U.S. 53 (1913); *Louisville Bridge Co.* v. *United States*, 242 U.S. 409 (1917).

The plaintiffs in both *Chandler-Dunbar* and *Louisville Bridge* held revocable licenses to build and maintain the structures involved in those cases. *Chandler-Dunbar, supra,* at 68; *Louisville Bridge, supra,* at 420. Plaintiff submits that revocability of the licenses involved in those cases makes both cases distinguishable from this case. Plaintiff argues that the license in this case was irrevocable—a fact the Supreme Court expressly recognized was not involved in *Louisville Bridge:*

> * * * We need not go so far as to say that Congress could not in any case by contract or estoppel prevent itself from modifying or revoking a regulation once made and substituting another in its place without compensation. * * * [*Id.* at 417.]

Plaintiff relies in its argument of irrevocability on the following provisions of the Federal Power Act:

> * * * Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter * * *. [16 U.S.C. § 799 (1976).]
>
> The right to alter, amend, or repeal this chapter is expressly reserved; but no such alteration, amendment or repeal shall affect any license theretofore issued under the provisions of this chapter or the rights of any licensee thereunder. [16 U.S.C. § 822 (1920).]

Plaintiff in discussing the foregoing statutory provisions says that an FPC license becomes irrevocable at some point in time under the express terms of 16 U.S.C. § 799 (1976), and after the license is vested with this irrevocable feature the licensee has the right to rely upon it in building and operating the licensed facility pursuant to the license terms. Plaintiff urges that once the license has become irrevocable it is clear that section 822 insulates it from subsequent

legislation which amends, repeals, or revokes the Federal Power Act.

Defendant answers the foregoing argument of plaintiff, based on sections 799 and 822, by citing *Scenic Hudson Preservation Conference* v. *Callaway*, 370 F.Supp. 162, 171 (S.D.N.Y. 1973), *aff'd per curiam*, 499 F.2d 127 (2d Cir. 1974), wherein it was held that subsequent legislation of general application is applicable to FPC licensees. In that case, Consolidated Edison argued that the application of the permit requirement of the Federal Water Pollution Control Act of 1972, § 404, 33 U.S.C. § 1344 (1977), to a project previously licensed by the FPC would violate section 28 of the Federal Power Act. The district court rejected this argument and held:

> Con Ed's final argument is that even if this conclusion is correct, § 404 cannot apply to a project such as Storm King, which was licensed prior to the passage of the Amendments, because section 28 of the Power Act provides:
>
> "The right to alter, amend, or repeal this chapter is expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this chapter, or the rights of any licensee thereunder." 16 U.S.C. § 822.
>
> The answer to Con Ed's argument that the 1972 Amendments to the Federal Water Pollution Control Act cannot, because of this section, affect its rights under a previously issued FPC license is that the Amendments are amendments to the Water Pollution Control Act and *not* to the Federal Power Act. The Amendments constitute law of general application which affect FPC licensees no more than any other economic group. We believe that § 28 was not intended to insulate FPC licensees from the effect of general Congressional legislation for the term of their licenses,

but only to protect them from ex post facto law-making relating specifically to FPC license requirements. [370 F.Supp. at 171.]

We agree with the reasoning above quoted, which was affirmed by the Second Circuit.

Pub. L. No. 94-407 reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Wild and Scenic Rivers Act (82 Stat. 905), as amended (16 U.S.C. 1271 et seq.) is amended as follows:
>
> (1) In section 2 delete "Maine, and that segment of the Wolf River, Wisconsin, which flows through Langlade County," and insert in lieu thereof "Maine; that segment of the Wolf River, Wisconsin, which flows through Langlade County; and that segment of the New River in North Carolina extending from its confluence with Dog Creek, downstream approximately 26.5 miles to the Virginia State line."
>
> (2) In section 7(a), after the third sentence, insert the following: "Any license heretofore or hereafter issued by the Federal Power Commission affecting the New River of North Carolina shall continue to be effective only for that portion of the river which is not included in the National Wild and Scenic Rivers System pursuant to section 2 of this Act and no project or undertaking so licensed shall be permitted to invade, inundate or otherwise adversely affect such river segment." [Approved September 11, 1976.]

We find that Congress specifically intended by the Act to amend the Wild and Scenic Rivers Act (1968), 16 U.S.C. § 1271 *et seq.* Although plaintiff argues section 2 of the Act could just as easily have been codified in the Federal

Power Act at 16 U.S.C. § 797(a) (1935), the language of the Act is plain and controlling.

> It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations. The Congress declares that the established national policy of dam and other construction at appropriate sections of the rivers of the United States needs to be complemented by a policy that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes. [16 U.S.C. § 1271 (1968).]

And the purpose of the Act is stated in section 1(c) as follows:

> The purpose of this chapter is to implement the policy set out in section 1271 of this title by instituting a national wild and scenic rivers system, by designating the initial components of that system, and by prescribing the methods by which and standards according to which additional components may be added to the system from time to time. [16 U.S.C. § 1272 (1968).]

Pub. L. No. 94-407 added approximately 26.5 miles of the New River in North Carolina, from Dog Creek downstream to the Virginia State line, to the national wild and scenic rivers system. Therefore, Congress decided that the New River at that point possessed outstanding "scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." We are not in a position to question such a decision of Congress. Clearly, the Wild and Scenic Rivers

Act is a statute of general application and the New River segment of 26.5 miles pertinent herein was added to the list of segments of many rivers Congress heretofore chose to list.[9] The obvious purpose of Congress was to preserve all of the listed segments of rivers in the original act of 1968 and river segments added by a later Congress or by procedures afforded the states.

The Wild and Scenic Rivers Act is a statute of nationwide application and without any doubt it is of general application. Once a segment of a river is listed in the statute or later added thereto the numerous restrictive preservation features of the statute become effective with relation to the segment. Examples of such restrictive features include: (1) the prohibition of other federal departments or agencies (in addition to the FPC) from licensing water resource projects if they would have an adverse effect on scenic river values, 16 U.S.C. § 1278 (1976); (2) withdrawal from "entry, sale, or other disposition" of public lands within the authorized boundaries of any such river included in the scenic river system, 16 U.S.C. § 1279 (1968); (3) mineral activities which remain permissible must be conducted in accordance with regulations designed to effectuate the purposes of the Act, 16 U.S.C. § 1280 (1968); and (4) each segment of the scenic river system shall be administered to protect and enhance the scenic value which caused it to be included in the system, primary emphasis to be given to protecting its esthetic, scenic, historic, archaeologic, and scientific features, 16 U.S.C. § 1281 (1968). The Wild and Scenic Rivers Act is clearly a statute of greater scope and purpose than the 1965

[9] Some of the rivers originally listed and later added to the list are: Elwen Point in Missouri, Feather in California, Rio Grande in New Mexico, Rogue in Oregon, Saint Croix in Minnesota and Wisconsin, Wolf in Wisconsin, Snake in Idaho and Oregon, Flathead in Montana, Missouri in Montana, Obed in Tennessee, Pere Marquette in Michigan, and Upper Delaware in New York and Pennsylvania.

Anadromous Fish Act, 16 U.S.C. §§ 757a-f, discussed in *Udall* v. *FPC*, 387 U.S. 428 (1967), wherein the problem of upstream salmon migrants on the Snake River using fish ladders and those traveling downstream going through proposed turbines, resulting in high mortality, was considered in the revocation by the Court of the FPC license involved in that case. The Court in *Udall* stated:

> * * * The grant of authority to the [FPC] to alienate federal water resources does not, of course, turn simply on whether the project will be beneficial to the licensee. Nor is the test solely whether the region will be able to use the additional power. The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest," including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife. [387 U.S. at 450.]

In other words the Federal Power Act is not immune from effects of other subsequent acts of Congress of general application. Licenses cannot be granted without considering the effects of such subsequent acts of Congress. In the case of the Wild and Scenic Rivers Act, the restriction to license is specific in that the Act prohibits licensing of listed segments of rivers and segments of rivers later added.

> (a) The Federal Power Commission shall not license the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act, as amended, on or directly affecting any river which is designated in section 1274 of this title as a component of the national wild and scenic rivers system or which is hereafter designated for inclusion in that system * * *. [16 U.S.C. § 1278.]

Certainly if the plaintiff's license for the Blue Ridge Project was irrevocable at the time Congress enacted Pub. L. No. 94-407 the question posed, but not answered, by the Supreme Court in *Louisville Bridge* would be squarely before us. We do not need to decide that question, however, for we find that plaintiff's license for the Blue Ridge Project was not sufficiently final at the time Congress enacted Pub. L. No. 94-407. Therefore, we hold that there was no taking of plaintiff's FPC license.

We find that the license for the Blue Ridge Project was not irrevocable because the license was still subject to judicial review in the courts. 16 U.S.C. § 825l (1958) [10] allows the reviewing court to stay the effective date of a license pending final review and if, during the review process, it is shown that the FPC did not adequately protect the public interest or comply with its statutory charter, the reviewing court can vacate the license and order further proceedings. *Udall* v. *FPC, supra.*

We find that the irrevocable attribute of an FPC license does not vest until judicial review is complete or the time for such review has lapsed. This interpretation of the Federal Power Act is in accord with the rule of construction which the Supreme Court announced in *Louisville Bridge.* In that case the plaintiff was seeking to assert an irrevocable franchise to operate a bridge across the Ohio River—a franchise similar to the one plaintiff is asserting herein. The basis for the irrevocable franchise in *Louisville*

[10] Review by the Supreme Court is specifically provided in the following language:

"* * * The judgment and decree of the [circuit] court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28. [16 U.S.C. § 825l(b).]

Bridge, as in this case, was an act of Congress.[11] In construing the act involved in *Louisville Bridge,* the Supreme Court stated the following rule of statutory construction when the grant of an irrevocable franchise was involved:

> * * * But when private rights of an indefeasible nature are sought to be derived from regulatory provisions established in the exercise of this power, the case is peculiarly one for the application of the universal rule that grants of special franchises and privileges are to be strictly construed in favor of the public right, and nothing is to be taken as granted concerning which any reasonable doubt may be raised. * * * [*Id.* at 417.]

From the facts of this case it is manifest that judicial review was never completed. Before the judicial process of testing the validity of the issuance of the FPC license for the Blue Ridge Project was complete, Congress enacted Pub. L. No. 94-407. Although plaintiff correctly articulated the review standards exercised by courts subjecting final administrative decisions to judicial review, this court's experience in applying identical standards establishes that the reversal of an agency's final decision is not as unusual as plaintiff suggests. *E.g., Macke Co.* v. *United States,* 199 Ct. Cl. 552, 467 F.2d 1323 (1972); *Sylvania Electric Products, Inc.* v. *United States,* 198 Ct. Cl. 106, 458 F.2d 994 (1972); *Reil* v. *United States,* 197 Ct. Cl. 542, 456 F.2d 777 (1972); *Gerace* v. *United States,* 194 Ct. Cl. 1031 (1971);

[11] The statute involved in *Louisville Bridge* differs from the statute, Federal Power Act, involved herein. The difference is that the statute involved in *Louisville Bridge* did not contain any provision expressly stating that the franchise was irrevocable. Nor did it contain any provision stating whether Congress could repeal or revoke the franchise. The Federal Power Act contains such express provisions. However, these provisions must be interpreted to establish when the irrevocable attribute of an FPC license vests. Although there is some difference in the statutory provisions between the cases, the rule of construction set forth in *Louisville Bridge* is equally applicable in this case.

DeVito v. *United States*, 188 Ct. Cl. 979, 413 F.2d 1147 (1969). And since we hold that the irrevocable attribute of the FPC license does not vest under the terms of the Federal Power Act until the validity of the issuance of the license has been completely tested or the time for judicial review has lapsed, Congress had the power and the right to amend the Wild and Scenic Rivers Act to include the New River as it did without becoming liable for just compensation under the terms of the Federal Power Act.

Because of the disposition of the case in the foregoing manner, we need not consider the issue raised by defendant as to whether plaintiff is required to secure a permit under the Federal Water Pollution Control Act of 1972, § 404, 33 U.S.C. § 1344 (1977), and its effect on the present case.

CONCLUSION

For the foregoing reasons, we grant defendant's cross motion for judgment on the pleadings and deny plaintiff's motion for partial judgment on the pleadings. The petition is dismissed.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 62-78

APPALACHIAN POWER COMPANY, ET AL.

v.

THE UNITED STATES

Before DAVIS, *Judge*, Presiding, KASHIWA and BENNETT, *Judges*.

ORDER

Filed November 21, 1979

This case comes before the court on plaintiffs' suggestion and motion, filed October 31, 1979, for rehearing *en banc* pursuant to Rules 7(d) and 151(b) with reference to the decision entered herein on October 17, 1979. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that plaintiffs' said motion for rehearing be and the same is denied.

BY THE COURT

/s/ OSCAR H. DAVIS
Oscar H. Davis
Judge, Presiding

November 21, 1979

APPENDIX C

Federal Power Act, 16 U.S.C. §§ 797, 798, 799, 803, 806, 822, 825h, and 825*l*

§ 797. General Powers of Commission

The Commission is authorized and empowered—

Investigations and data

(a) To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this chapter.

Statements as to investment of licensees in projects; access to projects, maps, etc.

(b) To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project, addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles,

contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

Cooperation with executive departments; information and aid furnished Commission

(c) To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission, to furnish such records, papers, and information in their possession as may be requested by the Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations.

Publication of information, etc., reports to Congress

(d) To make public from time to time the information secured hereunder, and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this subchapter, and in each case the parties thereto, the terms prescribed, and the moneys received if any, or account thereof. Such report shall contain the names and show the compensation of the persons employed by the Commission.

Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation

organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two

years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

Preliminary permits; notice of application

(f) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: *Provided, however,* That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated.

Investigation of occupancy for developing power; orders

(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

June 10, 1920, c. 285, § 4, 41 Stat. 1065; June 23, 1930, c. 572, § 2, 46 Stat. 798; Aug. 26, 1935, c. 687, Title II, § 202, 49 Stat. 839.

§ 798. Purpose and scope of preliminary permits; transfer and cancellation

Each preliminary permit issued under this subchapter shall be for the sole purpose of maintaining priority of application for a license under the terms of this chapter for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained. Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing.

June 10, 1920, c. 285, § 5, 41 Stat. 1067; Aug. 26, 1935, c. 687, Title II, § 203, 49 Stat. 841.

§ 799. License; duration, conditions, revocation, alteration, or surrender

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice. Copies of all licenses issued

under the provisions of this subchapter and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 20 of Title 41.

June 10, 1920, c. 285, § 6, 41 Stat. 1067; Aug. 26, 1935, c. 687, Title II, § 204, 409 Stat. 841.

§ 803. Conditions of license generally

All licenses issued under this subchapter shall be on the following conditions:

Modification of plans, etc., to secure adaptability of project

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

Alterations in project works

(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

Maintenance and repair of project works; liability of licensee for damages

(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

Amortization reserves

(d) That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. For any new license issued under section 808 of this title, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.

Annual charges payable by licensees

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided,* That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further,* That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or muncipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge;

and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

Reimbursement by licensee of other licensees, etc.

(f) That whenever any license hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.

Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 810 of this title.

Whenever any power project not under license is benefited by the construction work of a licensee or permittee,

the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.

Conditions in discretion of Commission

(g) Such other conditions not inconsistent with the provisions of this chapter as the Commission may require.

Monopolistic combinations prohibited

(h) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain or increase prices for electrical energy or service are hereby prohibited.

Waiver of conditions

(i) In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this subchapter, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances; *Provided,* That the provisions hereof shall not apply to annual charges for use of lands within Indian reservations.

June 10, 1920, c. 285, § 10, 41 Stat. 1068; Aug. 26, 1935, c. 687, Title II, § 206, 49 Stat. 842; Sept. 7, 1962, Pub.L. 87-647, 76 Stat. 447; Aug. 3, 1968, Pub.L. 90-451, § 4, 82 Stat. 617.

§ 806. Time limit for construction of project works; extension of time; termination or revocation of licenses for delay

The licensee shall commence the construction of the project works within the time fixed in the license, which

shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, has been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 820 of this title.

June 10, 1920, c. 285, § 13, 41 Stat. 1071.

§ 822. Reservation of right to alter or repeal chapter

The right to alter, amend, or repeal this chapter is expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the

provisions of this chapter, or the rights of any licensee thereunder.

June 10, 1920, c. 285, § 28, 41 Stat. 1077.

§ 825h. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

June 10, 1920, c. 285, § 309, as added Aug. 26, 1935, c. 685, Title II, § 213, 49 Stat. 858.

§ 825l. Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State,

municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order

of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its reccommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

June 10, 1920, c. 285, § 313, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 860, and amended June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 16, 72 Stat. 947.

APPENDIX D

Wild and Scenic Rivers Act of 1968, as amended by Pub. L. No. 94-407, 16 U.S.C. §§ 1273(a), 1277, and 1278(a)

§ 1273. National wild and scenic rivers system: Congressional authorization for inclusion; designation by State legislatures; permanent administration by States; application for inclusion by Governors; satisfaction of criteria; eligibility for inclusion; notification of Federal Energy Regulatory Commission; publication in Federal Register; expense to the United States; federally owned lands within boundaries of State rivers

(a) The national wild and scenic rivers system shall comprise rivers (i) that are authorized for inclusion therein by Act of Congress, or (ii) that are designated as wild, scenic or recreational rivers by or pursuant to an act of the legislature of the State or States through which they flow, that are to be permanently administered as wild, scenic or recreational rivers by an agency or political subdivision of the State or States concerned, that are found by the Secretary of the Interior, upon application of the Governor of the State or the Governors of the States concerned, or a person or persons thereunto duly appointed by him or them, to meet the criteria established in this chapter and such criteria supplementary thereto as he may prescribe, and that are approved by him for inclusion in the system, including, upon application of the Governor of the State concerned, the Allagash Wilderness Waterway, Maine; that segment of the Wolf River, Wisconsin, which flows through Langlade County; and that segment of the New River in North Carolina extending from its confluence with Dog Creek downstream approximately 26.5 miles to the Virginia State line. Upon receipt of an application under clause (ii) of this subsection, the Secretary shall notify the Federal Energy Regulatory Commission and publish such application in the Federal Register. Each river designated under clause (ii) shall be administered by the State or political subdivision thereof without expense to the United States other than for administration and manage-

ment of federally owned lands. For purposes of the preceding sentence, amounts made available to any State or political subdivision under the Land and Water Conservation Act of 1965 or any other provision of law shall not be treated as an expense to the United States. Nothing in this subsection shall be construed to provide for the transfer to, or administration by, a State or local authority of any federally owned lands which are within the boundaries of any river included within the system under clause (ii).

Pub.L. 90-542, § 2, Oct. 2, 1968, 82 Stat. 906; as amended Pub.L. 94-407, § 1(1), Sept. 11, 1976, 90 Stat. 1238; Pub.L. 95-625, Title VII, § 761, Nov. 10, 1978, 92 Stat. 3533.

§ 1277. Land acquisition—Grant of authority to acquire; State and Indian lands; use of appropriated funds

(a) The Secretary of the Interior and the Secretary of Agriculture are each authorized to acquire lands and interests in land within the authorized boundaries of any component of the national wild and scenic rivers system designated in section 1274 of this title, or hereafter designated for inclusion in the system by Act of Congress, which is administered by him, but he shall not acquire fee title to an average of more than 100 acres per mile on both sides of the river. Lands owned by a State may be acquired only by donation, and lands owned by an Indian tribe or a political subdivision of a State may not be acquired without the consent of the appropriate governing body thereof as long as the Indian tribe or political subdivision is following a plan for management and protection of the lands which the Secretary finds protects the land and assures its use for purposes consistent with this chapter. Money appropriated for Federal purposes from the land and water conservation fund shall, without prejudice to the use of appropriations from other sources, be available to Federal departments and agencies for the acquisition of property for the purposes of this chapter.

Curtailment of condemnation power in area 50 per centum or more of which is owned by Federal or State government

(b) If 50 per centum or more of the entire acreage within a federally administered wild, scenic or recreational river area is owned by the United States, by the State or States within which it lies, or by political subdivisions of those States, neither Secretary shall acquire fee title to any lands by condemnation under authority of this chapter. Nothing contained in this section, however, shall preclude the use of condemnation when necessary to clear title or to acquire scenic easements or such easements as are reasonably necessary to give the public access to the river and to permit its members to traverse the length of the area or of selected segments thereof.

Curtailment of condemnation power in urban areas covered by valid and satisfactory zoning ordinances

(c) Neither the Secretary of the Interior nor the Secretary of Agriculture may acquire lands by condemnation, for the purpose of including such lands in any national wild, scenic or recreational river area, if such lands are located within any incorporated city, village, or borough which has in force and applicable to such lands a duly adopted, valid zoning ordinance that conforms with the purposes of this chapter. In order to carry out the provisions of this subsection the appropriate Secretary shall issue guidelines, specifying standards for local zoning ordinances, which are consistent with the purposes of this chapter. The standards specified in such guidelines shall have the object of (A) prohibiting new commercial or industrial uses other than commercial or industrial uses which are consistent with the purposes of this chapter, and (B) the protection of the bank lands by means of acreage, frontage, and setback requirements on development.

Exchange of property

(d) The appropriate Secretary is authorized to accept title to non-Federal property within the authorized boundaries of any federally administered component of the national wild and scenic rivers system designated in section 1274 of this title or hereafter designated for inclusion in the system by Act of Congress and, in exchange therefor, convey to the grantor any federally owned property which is under his jurisdiction within the State in which the component lies and which he classifies as suitable for exchange or other disposal. The values of the properties so exchanged either shall be approximately equal or, if they are not approximately equal, shall be equalized by the payment of cash to the grantor or to the Secretary as the circumstances require.

Transfer of jurisdiction over Federally owned property to appropriate Secretary

(e) The head of any Federal department or agency having administrative jurisdiction over any lands or interests in land within the authorized boundaries of any federally administered component of the national wild and scenic rivers system designated in section 1274 of this title or hereafter designated for inclusion in the system by Act of Congress is authorized to transfer to the appropriate Secretary jurisdiction over such lands for administration in accordance with the provisions of this chapter. Lands acquired by or transferred to the Secretary of Agriculture for the purposes of this chapter within or adjacent to a national forest shall upon such acquisition or transfer become national forest lands.

Acceptance of donated land, funds, and other property

(f) The appropriate Secretary is authorized to accept donations of lands and interests in land, funds, and other

property for use in connection with his administration of the national wild and scenic rivers system.

Retained right of use and occupancy; termination; fair market value; improved property

(g)(1) Any owner or owners (hereinafter in this subsection referred to as "owner") of improved property on the date of its acquisition, may retain for themselves and their successors or assigns a right of use and occupancy of the improved property for noncommercial residential purposes for a definite term not to exceed twenty-five years or, in lieu thereof, for a term ending at the death of the owner, or the death of his spouse, or the death of either or both of them. The owner shall elect the term to be reserved. The appropriate Secretary shall pay to the owner the fair market value of the property on the date of such acquisition less the fair market value on such date of the right retained by the owner.

(2) A right of use and occupancy retained pursuant to this subsection shall be subject to termination whenever the appropriate Secretary is given reasonable cause to find that such use and occupancy is being exercised in a manner which conflicts with the purposes of this chapter. In the event of such a finding, the Secretary shall tender to the holder of that right an amount equal to the fair market value of that portion of the right which remains unexpired on the date of termination. Such right of use or occupancy shall terminate by operation of law upon tender of the fair market price.

(3) The term "improved property", as used in this chapter, means a detached, one-family dwelling (hereinafter referred to as "dwelling"), the construction of which was begun before January 1, 1967 (except where a different date is specifically provided by law with respect to any particular river) together with so much of the land on which the dwelling is situated, the said land being in the

same ownership as the dwelling, as the appropriate Secretary shall designate to be reasonably necessary, for the enjoyment of the dwelling for the sole purpose of noncommercial residential use, together with any structures accessory to the dwelling which are situated on the land so designated.

Pub.L. 90-542, § 6, Oct. 2, 1968, 82 Stat. 912; as amended Pub.L. 95-625, Title VII, § 763(b), Nov. 10, 1978, 92 Stat. 3533.

§ 1278. Restrictions on water resources projects—Construction projects licensed by Federal Power Commission

(a) The Federal Power Commission shall not license the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act, as amended, on or directly affecting any river which is designated in section 1274 of this title as a component of the national wild and scenic rivers system or which is hereafter designated for inclusion in that system, and no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration. Nothing contained in the foregoing sentence, however, shall preclude licensing of, or assistance to, developments below or above a wild, scenic or recreational river area or on any stream tributary thereto which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on October 2, 1968. No department or agency of the United States shall recommend authorization of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration, or request appropriations

to begin construction of any such project, whether heretofore or hereafter authorized, without advising the Secretary of the Interior or the Secretary of Agriculture, as the case may be, in writing of its intention so to do at least sixty days in advance, and without specifically reporting to the Congress in writing at the time it makes its recommendation or request in what respect construction of such project would be in conflict with the purposes of this chapter and would affect the component and the values to be protected by it under this chapter. Any license heretofore or hereafter issued by the Federal Power Commission affecting the New River of North Carolina shall continue to be effective only for that portion of the river which is not included in the National Wild and Scenic Rivers System pursuant to section 1273 of this title and no project or undertaking so licensed shall be permitted to invade, inundate or otherwise adversely affect such river segment.

As amended Pub.L. 93-621, § 1(c), Jan. 3, 1975, 88 Stat. 2096; Pub.L. 94-407, § 1(2), Sept. 11, 1976, 90 Stat. 1238.

Supreme Court, U.S.
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No. 79-1147

In the Supreme Court of the United States

OCTOBER TERM, 1979

APPALACHIAN POWER COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-16a) is reported at 607 F.2d 935.

JURISDICTION

The judgment of the Court of Claims was entered on October 17, 1979, and a petition for rehearing

was denied on November 21, 1979 (Pet. App. 1b). The petition for a writ of certiorari was filed on January 24, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether legislation enacted by Congress that had the effect of nullifying a license granted to petitioner Appalachian Power Company by the Federal Power Commission was a compensable taking of property within the meaning of the Fifth Amendment, where judicial review of the Commission order granting the license had not been completed before enactment of the legislation.

STATEMENT

1. On June 14, 1974, the Federal Power Commission issued a license to petitioner Appalachian Power Company [1] to build a hydroelectric dam (the "Blue Ridge Project") on the New River in Virginia and North Carolina. *Appalachian Power Co., Project No. 2317*, 51 F.P.C. 1906 (1974). At the time the license was issued, legislation was pending in Congress to designate the affected portion of the New River for protection under the Wild and Scenic Rivers Act of 1968, 16 U.S.C. 1271 *et seq.* (Pet. App. 4a n.4). Once

[1] Petitioners in this case are the licensee Appalachian Power Company and other power companies with derivative interests in the Blue Ridge Project (Pet. App. 1a-2a n.1). We use the term "petitioner" throughout this brief to refer to Appalachian individually and to petitioners collectively.

protected under the Act, the river segment would no longer be available for hydroelectric development. In recognition of that fact, and in order to afford Congress an opportunity to act on the legislation (already passed by the Senate and vigorously supported in the House), the FPC licensing order provided that the license would not take effect until January 2, 1975. *Appalachian Power Company, Project No. 2317, supra*, 51 F.P.C. at 1951. The Commission's accompanying opinion stated: "If there is no such Act of Congress by that date, the license herein granted will become effective, unless otherwise delayed by judicial review." *Id.* at 1952. The legislation was not enacted by Congress (Pet. App. 4a n.4).

Petitioner formally accepted the license by action of its Board of Directors on June 20, 1974 (Pet. App. 4a). Shortly afterward, in accordance with the judicial review provisions of the Federal Power Act, 16 U.S.C. 825*l* (Pet. App. 12c-14c), the State of North Carolina sought review of the Commission's licensing order in the United States Court of Appeals for the District of Columbia Circuit, alleging procedural defects in the FPC's decision-making process (*id.* at 5a). Prior to the effective date of the license, North Carolina sought a stay of the Commission's order pending review, which was granted by the court of appeals on January 31, 1975 (*ibid.*). On March 24, 1976, the court of appeals issued an opinion vacating the stay and affirming, with one modification, the Commission's order granting the license. *North Carolina* v. *FPC*, 533 F.2d 702 (D.C.

Cir. 1976). The court of appeals ordered that the license be modified to require petitioner to undertake archaeological research, excavation, and salvage in the project area prior to the dam construction as a condition of its license. 533 F.2d at 709. However, the decision of the court of appeals did not automatically reinstate an already effective license, for as the court expressly recognized, the Commission was required to decide, following the court's decision, whether to make the license effective immediately. 533 F.2d at 709-710.

North Carolina filed a timely motion in the court of appeals for a stay of the mandate, which was granted on May 5, 1976, to and including May 14, 1976. On May 14, 1976, North Carolina petitioned this Court for a writ of certiorari (*North Carolina* v. *FPC*, No. 75-1657). Under the provisions of Fed. R. App. P. 41, the court of appeals' mandate remained stayed pending disposition of the certiorari petition.[2]

2. Before this Court acted on North Carolina's petition for certiorari, Congress enacted an amendment to the Wild and Scenic Rivers Act which added to the national system of wild and scenic rivers the

[2] On March 26, 1976, two days after the court of appeals' opinion was issued, the Commission issued an order purporting to make the license effective immediately. Because the mandate of the court of appeals had not yet issued, however, the FPC was without jurisdiction to act in the case. *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 368-372 (1939); 16 U.S.C. 825*l*(a)-(b); 9 *Moore's Federal Practice* § 203.11 at 735 & n.5 (1975). See also *Hovey* v. *McDonald*, 109 U.S. 150 (1883).

segment of the New River that was to be affected by the Blue Ridge Project. Pub. L. No. 94-407, 90 Stat. 1238 (Sept. 11, 1976). The amendment specifically rendered ineffective any FPC license "heretofore or hereafter issued" affecting the designated wild and scenic portion of the New River.

Following the enactment of Pub. L. No. 94-407, this Court, on October 18, 1976, granted North Carolina's petition for certiorari, vacated the judgment below, and remanded to the court of appeals for further consideration in light of the new legislation. *North Carolina* v. *FPC*, 429 U.S. 891 (1976). The court of appeals concluded on remand that North Carolina's challenge to the license was now moot and dismissed the petition for review. *North Carolina* v. *FPC*, No. 74-1941 (D.C. Cir. Jan. 4, 1977).

3. Petitioner then filed the present action in the Court of Claims for compensation under the Tucker Act, 28 U.S.C. 1491, claiming that by nullifying its FPC license to build and operate the Blue Ridge Project—a license, according to petitioner, that had vested irrevocably for 50 years on its conditional effective date of January 2, 1975—Pub. L. No. 94-407 effected a taking of property or contract rights within the meaning of the Fifth Amendment. The Court of Claims granted summary judgment for the United States and dismissed the petition. The court found it unnecessary to decide to what extent FPC licenses may be irrevocable generally or under what conditions such licenses may vest. Instead, the court concluded that the enactment of Pub. L. No. 94-407

did not constitute a compensable taking because, at the time of the enactment, petitioner's license was still subject to judicial review and "the irrevocable attribute of an FPC license does not vest until judicial review is complete or the time for such review has lapsed" (Pet. App. 14a).

ARGUMENT

The decision of the Court of Claims is correct and does not conflict with any decision of this Court or a court of appeals. Moreover, this case arises from a unique set of circumstances, unlikely to recur, and thus is not an appropriate vehicle for reviewing the broad questions petitioner seeks to present.

Petitioner's contentions are essentially reducible to the claim that Congress could not, without paying compensation, exercise its legislative power under the Commerce Clause to protect the free flow of a navigable stream, where the exercise of that power had the effect of precluding the construction of a hydroelectric project by the recipient of a FPC license that was still under legal challenge at the time Congress enacted the legislation. Recognizing that any property rights it possessed with respect to the license arose solely under the Federal Power Act, 16 U.S.C. 791a *et seq.*, petitioner contends (Pet. 14-15) that, by virtue of certain provisions in that Act, its economic interest in building the project authorized by the license was converted, on January 2, 1975 (the proposed effective date for the license), into a vested right that could not be frustrated by legislation without the payment of compensation. Specifically, petitioner relies on provisions (1) empowering the Commission to issue licenses (16 U.S.C. 797(e)) for a period not exceeding 50 years (16 U.S.C. 799), (2) specifying that "[l]icenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered * * * only upon mutual agreement" (16 U.S.C. 799), and (3) stating that although Congress reserved the right to amend or repeal "this chapter [the Federal Power Act] * * * no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this chapter or the rights of any licensee thereunder" (16 U.S.C. 822).

1. As we explain below (pages 9-12, *infra*), we believe that the Court of Claims properly concluded that nothing in the Federal Power Act operates to give petitioner, or any other licensee, a right to compensation from the United States in the event that Congress chooses to enact legislation in connection with a different regulatory statute that frustrates plans to construct a project authorized by an FPC license, at least where such legislation is enacted before judicial review of the order granting the license is completed. But the judgment of the Court of Claims in this case is sustainable even without reaching that question: it is clear that, under the terms of the particular Commission opinion approving the issuance of the license at issue here, petitioner's license had not yet become effective at the time Congress enacted Pub. L. No. 94-407.

As petitioner notes (Pet. 11-12), the Federal Power Act provides that "[o]rders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe" (16 U.S.C. 825h). The FPC licensing opinion in this case designated January 2, 1975, as the effective date of petitioner's license but expressly noted that this date would not govern if (i) Congress had * * * previously enacted legislation preventing construction of the Blue Ridge Project or (ii) the license was "delayed by judicial review." *Appalachian Power Co., Project No. 2317, supra,* 51 F.P.C. at 1951-1952. It is beyond dispute that the licensing order was subject to judicial review on January 2, 1975, and that such review was not completed at the time Congress enacted Pub. L. No. 94-407. Indeed, a motion for a stay of the Commission's order, filed by North Carolina, was pending on January 2 and was granted by the court of appeals on January 31, 1975. Moreover, as explained above (page 4, *supra*), the court of appeals recognized that petitioner's license would only become effective by action of the Commission after the court, on March 24, 1976, had issued its opinion and vacated the stay of the order. (The FPC accordingly attempted to make the license effective immediately thereafter, albeit at a time when it lacked jurisdiction of the case (see page 4, note 2, *supra*).) Finally, North Carolina secured a stay of the court of appeals' mandate, and that stay was still in effect when Pub. L. No. 94-407 was enacted.

Petitioner's own conduct reflects a recognition of its position under the FPC opinion while judicial review was under way. As petitioner conceded in the court below (Pl. Brief after Argument at 6), it took no action in reliance on its license until after the FPC order had been modified by the court of appeals, and even then it confined itself to expending a "relatively small" amount for certain archaeological studies ordered by that court.

In sum, in light of the specific provision in the Commission's opinion conditioning the effectiveness of petitioner's license on the absence of a stay pending judicial review, there is no need in this case to decide the question "[w]hether an administrative agency lacks the power to create effective rights before the completion of judicial-review proceedings" (Pet. 2) or any of the other broad administrative law issues presented in the petition.

2. Even if the Commission's licensing opinion had not notified petitioner of the lack of final effectiveness of the license during the period of judicial review, the result reached by the Court of Claims would still be proper. The court correctly held (Pet. App. 14a) that whatever irrevocability may inhere in an FPC license, that "attribute * * * does not vest until judicial review is complete or the time for such review has lapsed." The issuance of such a license is a grant of a special franchise that depends ultimately on the regulatory power of Congress under the Commerce Clause. *Louisville Bridge Co.* v. *United States,* 242 U.S. 409, 417 (1917), teaches that, whether or

not Congress could "by contract or estoppel prevent itself from modifying or revoking a regulation once made and substituting another in its place without compensation" (a question not decided in *Louisville Bridge* and not presented in this case), it cannot be assumed, in the absence of a plain statement of a contrary congressional intent, that such a franchise has been rendered irrevocable. As the Court noted (242 U.S. at 417):

> [W]hen private rights of an indefeasible nature are sought to be derived from regulatory provisions established in the exercise of [the commerce] power, the case is peculiarly one for the application of the universal rule that grants of special franchises and privileges are to be strictly construed in favor of the public right, and nothing is to be taken as granted concerning which any reasonable doubt may be raised.

The Federal Power Act does grant several protections to a licensee. The Commission may not alter or revoke a license except for the reasons and pursuant to procedures specified in the Act (16 U.S.C. 799), and Congress has declared that it will not amend the Act in a way that affects licenses or the rights of licensees (16 U.S.C. 822). But the Act also provides that licenses issued by the Commission are fully reviewable in the courts (16 U.S.C. 825*l*), and nothing in the statute suggests that a license issued in a decision still under review (and thus still subject to modification or even extinction by the courts) is invulnerable to the general regulatory powers of Congress. Thus, in *Scenic Hudson Preservation Conference* v. *Callaway*, 370 F. Supp. 162, 171-172 (S.D.

N.Y. 1973), aff'd per curiam, 499 F.2d 127 (2d Cir. 1974), the court held that nothing in the Federal Power Act prevented Congress from enacting legislation (Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. 1344) that would impose permit requirements on FPC licensees who undertake projects that entail the discharge of dredged and fill materials into navigable waters—requirements that clearly may affect the right of a licensee to build a project authorized under the Federal Power Act. If Congress was empowered to enact legislation having that effect,[3] then there is no reason why Congress

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[3] Petitioner does not argue that *Scenic Hudson* was wrongly decided, but contends only that the Court of Claims did not construe it correctly (Pet. 21-22 n.20). Specifically, petitioner attacks the court's statement (Pet. App. 12a-14a) that, even had judicial review of the license concluded before the enactment of Pub. L. No. 94-407, that legislation would not fall within the proscription of 16 U.S.C. 822, because it is not an amendment to the Federal Power Act but rather part of "a statute of general application," like the Federal Water Pollution Control Act considered in *Scenic Hudson*. Although, as petitioner contends, Pub. L. No. 94-407 clearly had a specific—and intended—effect on petitioner's plan to construct the Blue Ridge Project as authorized under the FPC license, the law still qualifies as general legislation outside the proscription in 16 U.S.C. 822. The segment of the New River included in the Wild and Scenic Rivers Act by virtue of Pub. L. No. 94-407 acquired all of the protections provided by that Act, not just protection against the inundation that would result from the construction of the Blue Ridge Project (see Pet. App. 12a-13a). Moreover, there is nothing anomalous in extending the Act's protections to part of a single river. The express purpose of that statute is to protect "certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." 16 U.S.C. 1271.

may not, without providing compensation, take direct action to protect the free flow of a navigable river on which a project authorized under an FPC license is to be built, at least where the license is still under judicial challenge.

3. Contrary to petitioner's contention (Pet. 9-24), the decision of the court below does not conflict with *Payne* v. *New Mexico*, 255 U.S. 367 (1921), or *CAB* v. *Delta Air Lines*, 367 U.S. 316 (1961). Those cases concerned the powers conferred on administrative agencies by specific statutes to affect rights granted under those statutes.

In *Payne*, the Secretary of the Interior sought to withdraw an offer to exchange certain federal lands ("lieu lands") for other lands ("the base tract") originally open to selection by the State of New Mexico because the Secretary decided, after the State had made its selection of "lieu lands," that the federal government did not wish to acquire the base tract lands. The Court held that, although the State's selection application was pending in the General Land Office at the time the Secretary changed his mind, the Secretary was bound by the selection because his power to approve or disapprove selections was limited to determining whether they met all applicable requirements when made. Although the Court's opinion speaks in terms of the "vesting" of the State's right to the land selections (255 U.S. at 371), the case was not a suit for just compensation, and the Court decided merely that the Secretary was powerless to change his mind after a State selection had been

approved unconditionally, without regard to the limits on the Secretary's discretion under the applicable statute to deny approval of state selections.

Similarly, *Delta Air Lines* concerned an agency's power to alter an administrative decision after its effective date, without undertaking the notice and hearing required by statute for reconsideration in such circumstances. The Court did not hold that the administrative decision was immutable or that Congress could not, without granting compensation, enact legislation that might have the effect of frustrating the exercise of rights conferred by the decision. The Court held only that if the CAB desired to reconsider its decision, it must proceed in the manner prescribed by the governing statute. 367 U.S. at 329. That proposition in no way conflicts with the holding of the Court of Claims in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1147

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA

REPLY OF PETITIONERS TO BRIEF IN OPPOSITION

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REPLY OF PETITIONERS TO BRIEF IN OPPOSITION

The Solicitor General's principal defense of the result reached by the court below is an argument that nowhere appears in that court's decision and was never argued or explored at any previous stage of this litigation. The Government contends that petitioner Appalachian's license was not vested because the Commission's order was stayed at the time Pub. L. No. 94-407 was enacted. This is a wholly different theory from the theory of the Court of Claims, which held that no license, whether or not subject to a stay, can be a vested right until judicial review has been completed.

The Government's theory rests, as we shall see, on one incorrect assumption of fact, one unsound assump-

tion as to the law, and one highly dubious and scantily supported legal proposition. These matters can be considered on their merits if this Court grants certiorari; indeed, the Government's invocation of them makes this case more, rather than less, deserving of this Court's review. If the judgment below were not reviewed it would remain a precedent, not for the Government's new theory, but for what the Court of Claims actually held. For all the reasons advanced in the petition for certiorari, that result should not be permitted. It is additionally significant that the Government is unwilling to support the decision below as written and now finds it necessary to rely on an argument not only not adopted by the court below but expressly repudiated by the Government in the proceedings there.[1]

I.

The Solicitor General's incorrect assumption of fact is that the mandate of the court of appeals in *North Carolina* v. *FPC,* 533 F.2d 702 (D.C. Cir. 1976), was subject to a stay at the time Pub. L. No. 94-407 was enacted. This, the Government asserts, follows from the fact that the court of appeals on May 5, 1976, granted a stay of its mandate to and including May 14, 1976, and that "under the provisions of Fed. R. App. P. 41, the . . . mandate remained stayed pending disposition of the certiorari petition." Brief in Opposition, p. 4. Rule 41, however, provides that such a stay shall continue only "if during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court . . . ." The docket sheet of the court of appeals shows that such a notice was *not* filed during the period of the stay but was filed only on May 17, 1976. *See* Appendix hereto. Since no notice was filed by May 14, 1976, the provision of Rule 41 continuing the stay of mandate until final disposition of the certiorari petition by this Court never came into effect, and the stay of mandate expired according to its terms on May 14, 1976.[2] No stay was in effect when Pub. L. No. 94-407 was enacted. Thus the factual premise of the Government's argument falls.[3]

[1] "This stay [the stay granted by the Court of Appeals in North Carolina v. FPC, on January 31, 1975, on which the Government so heavily relies] was ultimately vacated . . . ." Defendant's cross-motion for judgment on the pleadings and defendant's response to plaintiffs' motion for partial judgment on the pleadings, Ct. Cl. Doc. No. 62-78, December 29, 1978, p.2.

II.

The Government's unsound assumption of law—not stated explicitly, and not supported by any authority—is that a stay on appeal impairs the effective or vested

[2] The fact that the court of appeals never issued the mandate is of no significance for the expiration of the stay. Rule 41 makes the issuance of the mandate mandatory once certain conditions are met. The court's failure to perform a ministerial act cannot change rights dependent upon the mandate, even assuming that petitioner's rights were so dependent. See Parts II and III, which demonstrate that they were not.

[3] The Government's mistake on this point is perhaps understandable since neither the stay of mandate relied on by the Government nor the docket entry mentioned above even appears in the record of this case. The risk of such mistakes is substantial when, as here, the Government chooses to raise a wholly new theory, for which even the factual basis was not laid below, when a case reaches this Court.

quality of a right, rather than merely postponing its exercise. The correct view is that a stay is simply a postponement of the ability to exercise a right. Here, the stay (which, as shown above, had in any event expired by the time petitioner's license was nullified) was for the sole purpose of postponement in case the license should be divested by the occurrence of a condition subsequent that was a qualification of the license itself: namely, reversal on judicial review, an occurrence that never happened. The purpose of the stay was not to give Congress yet another chance to nullify the license without compensation. Even if a stay had existed at the time Congress acted, it should not be held to have had such an effect.[4]

The FPC's order, effective January 2, 1975, was of course a "final order," which is one that "impose[s] an obligation, den[ies] a right or fix[es] some legal relationship as a consummation of the administrative process." *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948); *Ecee, Inc.* v. *FPC*, 526 F.2d 1270, 1273 (5th Cir.), *cert. denied*, 429 U.S. 867 (1976); *see Port of Boston Maine Terminal Association* v. *Rederiaktiebologet Transatlantic*, 400 U.S. 62, 71 (1970).

[4] The Government, by taking one phrase from the Commission's opinion granting the license out of context, has also attempted to argue that the Commission itself conditioned effectiveness of the license on the absence of judicial-review proceedings. Brief in Opposition, p. 8. However, the Commission's own opinion of December 31, 1974, expressly refused to order a stay denying the effectiveness of the license because of judicial review. 52 F.P.C. 1986 (1974). North Carolina's simple request for a stay or its filing a notice of appeal from the Commission's decision could not, in itself, prevent the license from becoming effective, since the Federal Power Act explicitly states that "[t]he commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order." 16 U.S.C. § 825*l*(c). *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 155-56 (1967).

The sole purpose and effect of a stay of an agency order is to maintain the status quo while the reviewing court considers the merits of the case. *See Cumberland Tel. & Tel. Co.* v. *Louisiana Public Service Commission*, 260 U.S. 212, 219 (1922); *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). The entry of a stay is not an adjudication of the merits of the controversy and cannot affect the vested nature of rights involved therein. *Cf. Frith* v. *Blazon-Flexible Flyer, Inc.*, 512 F.2d 899, 900 (5th Cir. 1975). Thus, although the court of appeals' stay precluded petitioner temporarily from exercising its rights under its license and thereby disturbing the status quo, the rights themselves were unaffected pending the appeal.

III.

The Government's dubious legal proposition is that a court of appeals judgment affirming an agency decision has no effect whatever until the court's mandate is received by the agency. In *North Carolina* v. *FPC*, *supra*, the court of appeals' opinion and judgment of March 24, 1976, affirming the FPC's decision, provided that "the stay order by this court dated January 31, 1975 is vacated." 533 F.2d at 710. The Government's theory is that (a) in spite of this language the stay continued so long as the mandate remained unreceived by the FPC, and (b) the FPC was without jurisdiction when on March 26, 1976, it declared that the license "is in effect." *Appalachian Power Co., Project No. 2317*, FPC Order Modifying License (March 26, 1976).

None of the authorities cited by the Government (p. 4, n.2) distinguish between the general return of jurisdiction to the agency and the status of a stay pending appeal. This distinction, which is recognized among other places in Fed. R. Civ. P. 62, is of critical importance to the Government's argument. Courts of appeals have acknowledged that lower courts or agencies retain some power over a case even while it is pending in the court of appeals. *E.g., Puerto Rico* v. *SS Zoe Colocotroni,* 601 F.2d 39 (1st Cir. 1979); *United States* v. *El-O-Pathic Pharmacy,* 192 F.2d 62, 78-80 (9th Cir. 1951). Even if jurisdiction for some purposes does not return to the agency until the mandate is received, the court of appeals has the power to vacate a stay, and the agency has the power to recognize that act, whenever the court so orders.

The relevant part of the FPC's order of March 26, 1976, did not purport to exercise jurisdiction; it was merely declaratory or explanatory. The relevant portion reads:

> "As to the effective date of the license, we observe that Ordering Paragraph (D) of the license now provides:
>
> > (D) The license granted herein shall become effective January 2, 1975, unless on that date there exists an Act of Congress that would delay or foreclose the Blue Ridge Project.
>
> As the Court of Appeals observed, 'The proposed legislation was not enacted by Congress'. Slip Op., p. 4. This Commission has heretofore granted no stay in the effective date of the license. The stay granted on January 31, 1975, by the Court of Appeals was vacated effective March 24, 1976. Accordingly, the license for the Blue Ridge Project, subject to Article 33 as herein modified, is in effect."

It is true that the court of appeals apparently thought some further action by the Commission was necessary "to make the license effective." 533 F.2d at 709. However, as the Commission correctly pointed out in the passage quoted above, the exercise of the license *automatically* became free of any constraint as soon as the stay issued in connection with the review petition had been vacated. A merely declaratory order would not have been in excess of the Commission's jurisdiction even while the appeal was pending, since 16 U.S.C. § 825*l*(b) makes the court of appeals' jurisdiction exclusive only "to affirm, modify, or set aside such order in whole or in part," which does not appear to prohibit declaratory orders. The Government's position that the Commission could not so act even after the appeal was over and the stay was lifted is wholly without merit.

IV.

The Government has also made several other points that can be answered briefly. First, it suggests that petitioner has somehow conceded that its license was not effective because "it took no action in reliance" on the license until after the court of appeals had rendered its decision. Brief in Opposition, p. 9. Petitioner's prudence during the periods when the license was not subject to a stay, however, is hardly a concession that the Government's theory is correct. The Government admits that petitioner did commence preliminary archaeological studies under the license after the court of appeals had affirmed it. In any event, the risk that caused petitioner to move slowly while judicial review was pending—namely, that a court would overturn the license—never materialized.

Second, in arguing that Pub. L. No. 94-407 was a "law of general application," pp. 11-12 and n.3, the Government is again trying to avoid defending the Court of Claims' actual decision. The court below did discuss that theory at some length, but it made it clear that the decision was based solely on the pendency of judicial review. For reasons suggested briefly in our Petition (p. 6 n.4; p. 8 n.6; p. 21 n.20), the argument is wholly without merit. As with the Government's principal argument, its invocation here makes the case more, rather than less, deserving of review by this Court.

Finally, the Government has unsuccessfully attempted to distinguish the two decisions of this Court with which the Court of Claims opinion conflicts, *Payne* v. *New Mexico,* 255 U.S. 367 (1921), and *CAB* v. *Delta Air Lines,* 367 U.S. 316 (1961). The Government concedes that the Secretary of the Interior in *Payne* was empowered to decide whether the land selections "met all applicable requirements [of the law] when made." This is precisely the extent of the court of appeals' power under 16 U.S.C. § 825*l*. The Government fails completely to recognize that the underlying rationale of *Delta Air Lines* was deference to the congressional purpose to ensure security of route, just as Congress intended in the Federal Power Act to ensure security of investment in hydroelectric projects. An interpretation of the Federal Power Act that fails to implement this congressional purpose would conflict with *Delta Air Lines.*

CONCLUSION

For all the reasons stated above and in the petition for certiorari, this Court should grant the petition.

Respectfully submitted,

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April 25, 1980

APPENDIX

APPENDIX

Excerpt from Docket Entries,
North Carolina v. FPC, Doc. No. 74-1941
United States Court of Appeals for the D.C. Circuit

DATE	FILINGS-PROCEEDINGS
(G) 5-17-76	Certified copy of notice from Supreme Court that writ of certiorari [sic] was filed on May 14, 1976 in S.C. No. 75-1657